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No. 62

In the

Supreme Court of the United States

October Term 1965

ROBERT J. JOBE and WILLIAM B. FARNEY,
Appellants,

vs.

CITY OF ERLANGER,
Appellee.

JURISDICTIONAL STATEMENT

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Copy of this JURISDICTIONAL STATEMENT was served upon Harry L. Riggs, Attorney for Appellee, 25 Erlanger Road, Erlanger, Kentucky, this 4 day of March, 1965.

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James C. Ware,
Of Counsel for Appellants.

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JURISDICTIONAL STATEMENT

1. (a) The within matter is reported officially in 383 SW (2nd) 675, Ky., decided May 8th, 1964; re-hearing denied December 4th, 1964..

(b) (i) The nature of these proceedings involves the constitutionality of Kentucky Revised Statute 81.190 (4) expressly providing that there shall be no appeal from the Judgment of the Circuit Court in annexation proceedings involving third-class cities.

(ii) The Judgment herein appealed from is the Judgment of the Court of Appeals of Kentucky, rendered and entered of record on May 8th, 1964. On December 4th, 1964, the Court of Appeals of Kentucky entered an Order denying the Petition for Re-hearing filed by the Appellant herein and affirming its Original Judgment. The Notice of Appeal to the United States Supreme Court was filed by the Appellant herein in the Court of Appeals of Kentucky on December 22nd, 1964, and filed of record on December 28th, 1964.

(iii) The statutory provision believed to confer jurisdiction on this Court is the fact that Kentucky Revised

Statute 81.190 (4) expressly provides that there shall be no appeal from the Judgment of the Circuit Court in Annexation Proceedings involving third-class cities. It is further pointed out that there is a similar denial of an appeal in the Statute relating to Annexation by fifth-class cities. Appeals are permitted in similar cases involving cities of the other four classes. There is no valid basis for saying that appeals shall be permitted in second- and fourth-class city annexation cases and that an appeal shall be denied in a third-class city; since cities are classified solely on the basis of population pursuant to Kentucky Constitution, Section 156. To draw such a distinction between third- and fifth-class cities as opposed to other class cities is a denial of the equal protection of the law in violation of the equal protection clause of the Federal Constitution. which protection is as set forth in the Fourteenth Amendment of the United States Constitution, which expressly forbids a State to deny to any person within its jurisdiction equal protection of the laws. The Fourteenth Amendment is a guarantee that all persons subjected to State Legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities opposed. 16A C.J.S., Constitutional Law, Section 502, pages 296 and 297.

(iv) *U. S. ex rel. Brown* v. *Smith,* D.C. Vt. 1962, 200 Federal Supplement 885, 306 F. (2nd) 596, 83 S. Ct. 1012, 372 U.S. 959, 10 L.Ed. (2nd) 11. *Legates* v. *Heverin,* Del. Super 1962, 196 A. (2nd) 403. *State* v. *Janiec,* 1951, 80 A. (2nd) 94, 6 N.J. 608, 71 S. Ct. 1007, 341 U.S. 955, 95 L.Ed. 1376. *People ex rel. Powott Corporation* v. *Woodworth,* 1939, 15 N.Y.S. (2nd) 985, 172 Misc. 791. *Hernandez* v. *State of Texas,* Tex. 1954, 74 S. Ct. 667, 347 U.S. 475, 98 L.Ed. 866. *City of Louisville* v. *Klusmeyer,* Ky. 1959, 324 SW (2nd) 831. *State* v. *Pirkey,* 1959, 281 P. (2nd) 698, 203 OR. 697. *H. P. Welch Co.* v. *State,*

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(v) Kentucky Revised Statute 81.190:

"Any city of the third-class may annex any territory to the city or reduce the boundaries of the city, in the same manner and under the same procedure as is provided in KRS 81.100 and 81.110 for annexation of unincorporated territory or reduction of boundaries by cities of the first-class, with the following exceptions:

(4) There shall be no appeal from the Judgment of a Circuit Court."

Kentucky Revised Statute 81.230:

"Any city of the fifth-class may annex any territory to the city or reduce the boundaries of the city, in the same manner and under the same procedure as is provided in KRS 81.100 and 81.110 for annexation of unincorporated territory or reduction of boundaries by cities of the first-class, with the following exceptions:

(3) There shall be no appeal from the Judgment of the Circuit Court."

Kentucky Revised Statute 81.110:

"Protest against annexation of unincorporated territory or reduction of territory by first-class cities:

(3) An appeal from the Judgment may be taken as in other cases, but there shall be no change of venue from the county. Costs shall follow the Judgment."

Kentucky Revised Statute 81.140:

"Annexation of unincorporated territory or reduction of territory by second-class cities.
(There is no denial of the right of appeal.")

Kentucky Revised Statute 81.210:

"Annexation or reduction of territory by fourth-class cities.
(There is no denial of the right of appeal.")

Kentucky Revised Statute 81.240:

"Annexation or reduction of territory by sixth-class cities.
(There is no denial of the right of appeal.")

The Statutes herein quoted are as appear in Baldwin's Revised Statutes Service, "Kentucky Revised Statutes Annotated," as appear on pages 154 through 159 of said edition.

(c) (i) The primary question presented by this appeal is the fact that in cases of proposed annexation by cities of the first-, second-, fourth-, and sixth-class, the right of appeal to the Court of Appeals of Kentucky, (which is the highest Appeals Court in this State) is granted; however, the right of appeal is denied in annexation matters involving proposed annexations by cities of the third-class and the fifth-class. The instant matter involves the City of Erlanger, which is a city of the third-class.

It has previously been decided both in this State and elsewhere, that the denial of the right of appeal in a given matter is not in and of itself a denial of a person's constitutional rights, so long as the denial of the appeal as to a given subject matter is denied to all persons within the jurisdiction of the State, but not granted to some and denied to others; except that such distinction and differ-

entiation be based on some sound reason for drawing the distinction. Further, it has been previously decided, both in the State of Kentucky and also in the United States Supreme Court, that a State may devise various classifications, based on population or other reasons, without violating the United States Constitution, particularly the Fourteenth Amendment thereto, so long as the classifications, themselves, are based upon reasonable distinctions and such classifications are not made arbitrarily and capriciously.

However, as pointed out in the dissenting opinion of Judge Montgomery, the denial of an appeal in third-class city annexation cases is a denial of the equal protection of the law afforded by the Fourteenth Amendment to the United States Constitution, in that the Fourteenth Amendment is a guarantee that all persons subjected to State Legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities opposed. As further pointed out by Judge Montgomery:

> "There is no valid basis for saying that appeal shall be permitted in second- and fourth-class city annexation cases and that an appeal shall be denied in a third-class city. Cities are classified on the sole basis of population. Kentucky Constitution, Section 156. Express provision therein is made for the change of classification as its population may increase or decrease. Such differences in population cannot be made the basis for denying the freeholders of territory contiguous to a city the right to appeal in an annexation proceeding. *There is no reasonable relationship between population and appeal.* (Emphasis ours). There is no difference in circumstances or condition between freeholders of territory contiguous to second-, third,- and fourth-class cities, except a difference in population of the respective cities. It is possible that the popula-

> tion may be the same or substantially so in cities of different classes."
>
> "The inevitable conclusion is that the statute which denies an appeal in this case is a denial of the equal protection of the law under the Federal Constitution

Therefore, the appeal of this matter shall be limited to the Fourteenth Amendment, as the same has to do with the equal protection of the laws provided thereby and shall not involve any other United States Constitutional question, except to the extent that "the due process clause" of the Federal Constitution is inter-related with the question of equal protection.

(d). A concise statement of the case containing the facts material to the consideration of the questions presented is that indicated in Paragraph (c) above. The Federal question herein sought to be reviewed was first raised upon the initial filing of these proceedings, the "protest against annexation of unincorporated territory lying adjacent to and contiguous with the generally easterly boundary of the City of Erlanger, Kentucky," which is found on pages 3 through 11 of the transcript of record filed herein, particularly the following language as it appears in Paragraph (5) thereof on page 6 of the transcript, to-wit:

> "Plaintiffs further state that Section 81.190, Kentucky Revised Statutes, is unconstitutional in that it provides in sub-section (4): 'There shall be no appeal from the Judgment of the Circuit Court', and said sub-section violates Section 59 of the Constitution of Kentucky, which provides that the General Assembly shall not pass local or special acts in any case where a general law can be made applicable; and the provision of said sub-section denies to the plaintiffs herein the equal protection of the law in violation of Section (1) of the Fourteenth Amendment of the Constitution of the United States."

The Federal question also appears on page 16 of the transcript of record (3) of the stipulations filed herein as follows:

> "That aside from the constitutionality of KRS 81.190 raised in Paragraph (5) of plaintiff's Protest against Annexation, the only issue to be tried by this Court is whether failure to annex will materially retard the prosperity of the city, and of the owners and inhabitants of the territory sought to be annexed."

The Federal question is next presented on page 22 of the transcript of record as a part of the Judgment of the Kenton Circuit Court entered herein with specific reference to the following language as it appears on page 22:

> Plaintiff raises the question of constitutionality of KRS 81.190 (4) wherein, "There shall be no appeal from the Judgment."

The Federal question is next presented in Brief for Appellants, filed herein on August 14th, 1962, which apparently was not forwarded with the transcript of proceedings, but which is attached hereto as an appendix. The Federal question appears on pages 2, 3 and 4 of the Brief for Appellants. The Federal question was next presented in appellant's Petition for Re-Hearing, which appears on page 168 of the transcript of the record herein.

The rulings of the involved Courts as to the Federal question will be found in the record at the following places:

1. The Judgment of the Kenton Circuit Court, pages 23 to 26 of the record.
2. The decision of the Court of Appeals as appears on pages 161 to 163 of the transcript of record.
3. The Order of the Court of Appeals overruling the Petition for Re-Hearing as appears on page 170 of the transcript of record.

(e) Appellant believes strongly that the Kentucky Statute under which this territory is proposed to be annexed is unconstitutional and that the United States Supreme Court will so rule by reason of the obvious and patent lack of a reasonable basis for denying the right of appeal in matters involving third-class cities and fifth-class cities and granting the right of appeal to others. However, appellant is vastly concerned that the Supreme Court of the United States might consider that the question is other than a substantial one; a question that is of interest only to a few hundred residents, an otherwise insignificant area of this vast country and thus, perhaps in the opinion of the United States Supreme Court, a question which is less than national in interest and less than national in importance.

As to this possible approach, appellant states that the question is as serious as the very serious question recently decided by the United States Supreme Court as to apportionment of legislative and senatorial districts based on population alone; in fact, it seems to appellant that the question is of a similar nature in that this State previously considered that its division into various legislative and senatorial districts was purely a political and therefore, purely a State question, not involving any Federal question. It seems as clear in this case as it does in the decision involving the apportionment of districts, that an individual's constitutional rights are considered matters of great importance by the United States Supreme Court and are not overlooked or shoved under the desk, purely by reason of the fact that they involve acts of a State legislature, rather than of the Congress of the United States.

Historically, it is seen that the Fourteenth Amendment was created and ratified primarily to protect against discrimination by reason of color or race. However, the United States Supreme Court has ruled on many occasions

that the Fourteenth Amendment in its application is not restricted to discrimination on the basis of color or creed, but is protection against discrimination, on any unreasonable basis, of an individual's or a class of individuals' constitutional rights.

While the instant case might not present the question as emphatically as might a question of real national interest, certainly there is involved in this matter a much greater and wider question and that is the right, if such right exists, of the State legislature to attempt merely geographically, or by capricious classification or alleged classification of population or people to deny to individuals, the most important rights which they hope to preserve and which they look to the United States Supreme Court, not infrequently, to preserve.

Certainly, the over-all question of annexation is a matter primarily of State interest, rather than of a Federal question. However, there are factual situations under the law of Kentucky which on the one hand entitle a city to annex, but which on the other hand, might be such facts as to deny to a city the right to annex an area, which is entirely of a character not subject to annexation. As in the instant matter, the question was before the Court as to whether a denial of annexation would materially retard the progress and prosperity of the City of Erlanger. Appellant feels that a review of these factual questions by the Kentucky Court of Appeals would result in a favorable finding on the part of said appellants; however, a review of the factual questions cannot even be presented by reason of the denial of appeal in this instance. In other words, appellants believe that the facts of this matter should be reviewed on appeal, the same as they would be if the annexation had been undertaken by cities of the first-, second-, fourth-, or sixth-class. On the other hand, perhaps on a review of the facts, under the law, of this situation, the Kentucky Court of

Appeals would disagree. In any event, appellants should be entitled, as are residents and freeholders of areas annexed by other class cities, to a thorough and proper review of all of such questions. To grant such review to some of its citizens and to deny it to others, is a clear denial by the Kentucky Legislature of constitutional rights under the Fourteenth Amendment of the United States Constitution; and this is true, unless it can be shown that to differentiate and to distinguish one class from another is on the basis of some rational distinction. Our Appeal to the Kentucky Court of Appeals and the dissenting opinion of Judge Montgomery both present to the majority of the Kentucky Court of Appeals a challenge to set forth any, and we emphasize "any" reasonable basis for drawing such a distinction. That the Court of Appeals of Kentucky has failed to indicate the reason for so distinguishing is clearly only that there is no difference and there can be none.

Appellants are entitled to an appeal to the Kentucky Court of Appeals of all questions, both of law and of fact, which right is granted to its fellow citizens, but denied to them.

Respectfully submitted,

.....

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Attorney for Appellants.

APPENDIX A

KENTON CIRCUIT COURT
C. L. & Eq. Division

No. 6670

ROBERT J. JOBE, ET AL,
Plaintiffs,

vs.

CITY OF ERLANGER,
Defendant.

FINDING OF FACTS; CONCLUSIONS OF LAW; AND JUDGMENT OF THE COURT

(Filed March 29, 1962.)

This matter came on for hearing and trial on the merits before the court without a jury on January 11, 1962, at Covington, Kentucky. Plaintiff was present through the City Co-ordinator, City Engineer and Mayor and represented by Harry L. Riggs, the City Attorney and Harry L. Riggs, Jr. The Plaintiffs, Robert J. Jobe and William B. Farney, were present and represented by James Nolan of Ware, Bryson and Nolan.

FINDING OF FACTS

Stipulations were entered into between the parties through their counsel, stipulating that, (1) more than seventy-five (75%) per cent of the freeholders in the area

proposed to be annexed, object to said annexation; (2) that the City ordinances proposing to annex said territory were properly passed and published according to law and that no objection will be made thereto by Plaintiff; and (3) that aside from the constitutional issue, the only issue to be tried by the court, is whether failure to annex will materially retard the prosperity of the City and of the owners and inhabitants of the area sought to be annexed.

The burden being upon the Defendant to go forward with proof, considerable evidence was introduced by it. The court finds that the Defendant, City of Erlanger, is a prosperous and progressive third class municipality surrounded on two sides by other municipal corporations and therefore unable to expand in these directions. Of the remaining two sides, the area to the north is extremely rough and not adaptable to annexation at this time. The only remaining territory is the subject of this action. The Court further finds that most of the utilities and improvements available in the area proposed to be annexed, are the direct result of the efforts of the Defendant. The sanitary sewer line which crosses this area, is the result of the contract entered into between the Defendant, and the Sanitation District No. 1 of Campbell and Kenton Counties. The expenses incurred in the construction of this line were born in part by the residents of the Defendant.

The territory along Stephenson Road and Turkeyfoot Road is served with a water main. The Stephenson Road water main is the result of negotiations between the Defendant and the Kenton County Water Commission No. 1 and the construction of the main along Turkeyfoot Road was favorably influenced by these negotiations. The court finds that the county or city zoning to be enjoyed by the inhabitants of this territory, will be the direct result of the present zoning regulations of the Defendant City to which this territory is contiguous.

The court further finds that the progress of the Defendant City, will be retarded and further expansion prevented if annexation does not take place. The Defendant has approximately two hundred (200) home sights remaining to be developed. At the present rate of development, one hundred (100) per year, these building areas will be exhausted in two years.

The court finds that the prosperity of the inhabitants of this territory will be materially retarded by failure to annex. Fire insurance rates will be reduced by reason of fire protection to be received from the Defendant. There will be substantial increase in land values by reason of being annexed to the Defendant. This territory will further enjoy improved winter road service and street lighting. All facilities of the Defendant City will be made available to the inhabitants of this territory.

CONCLUSION OF LAW

Plaintiff and Defendant submitted post-trial memorandums in support of their positions. Under the law as contained in KRS 81.110 and 81.190 this matter was tried before the court without jury. As agreed to by the parties through stipulations aforesaid, the only issue to be tried by this court is—

> KRS 81.110 (2) . . . the annexation or reduction shall not take place, unless the judge finds from the evidence that a failure to annex or strike off will materially retard the prosperity of the City and owners and inhabitants of the territory sought to be annexed . . . ."

The court finds as a matter of law that from the evidence failure to annex will materially retard the prosperity of

the City of Erlanger and of the owners of the territory sought to be annexed.

In the case of PARK ET AL v. CITY OF COVINGTON, 187 Ky. 311, (March 2, 1920) 218 S.W. 986, The Court of Appeals said:

> "It was further shown that the improvement of Twenty-seventh street, by the construction of a trunk sewer, the paving of the street with granite block, the construction of sidewalks, and the bringing of gas into that part of the City, would enhance the value of the property in that section, including the property in question, from 50 to 100 per cent. On the other hand, the failure to annex the territory, which would prevent these improvements from being made, would not only retard the enhancement in price of the property in question, but would retard the growth and prosperity of the city on the opposite side of the street, since that portion of the city would not be built up until the improvements were made. In addition to this, it was shown that the inhabitants of the territory in question enjoy the same benefits and protection from the city government that the inhabitants on the opposite side of the street now enjoy.
>
> In view of the foregoing evidence, we see no reason to disturb the finding of the chancellor. In our opinion, the evidence makes it clear that, if the annexation does not take place, the inhabitants of the surrounding territory will be denied many governmental privileges which they would otherwise enjoy, and that this will deter others from locating in that vicinity, thereby postponing the development of the surrounding territory and the territory in question, preventing its enhancement in price, and thus necessarily retarding the prosperity not only of the city, but of the owners and inhabitants of the territory sought to be annexed."

Further law applicable to this case is contained in S. S. LIKINS ET AL v. CITY OF CLARKSON (June 24, 1955) 280 S.W. (2nd) 491, the Court of Appeals stated:

> "The term 'retard prosperity' means to delay progress of the community as 'gauged by its attainments in the many fields affecting the welfare of its inhabitants and the owners of property comprising its territorial limits. Thus economic, religious, social, educational, safety, and sanitary conditions are factors to be taken into consideration in determining the prosperity of a community as a whole.' Loeffler v. City of Louisville, 308 Ky. 629, 215 S.W. (2d) 535, 536. In determining the question, the court views the situation as a whole — 'the city as an organized community and the suburban property as an unorganized community.' Masonic Widows and Orphans Home and Infirmary v. City of Louisville, 309 Ky. 532, 217 S.W. (2d) 815, 819. It is apparent that each case of annexation is to be decided according to its own peculiar conditions and facts."

Plaintiff raises the question of constitutionality of KRS 81.190 (4) wherein, ". . . there shall be no appeal from the judgment." The question of the constitutionality of KRS 81.190 has been upheld, YOUNT v. CITY OF FRANKFORT, 255 S.W. (2d) 632, (February 27, 1953) the Court of Appeals stated:

> "Furthermore, they cannot complain of the ruling of the court denying them default judgment since KRS 81.190 (4) provides there shall be no appeal from the judgment of the circuit court in annexation proceedings by a third class city. The power of the Legislature to deny the right to appeal has always been recognized. Section 110 Ky. Constitution; Mason v. Montgomery County Board of Education, 291 Ky. 654, 165 S.W. (2d) 346. However, we have written that where in the same case the constitutionality of an Act of the Legislature is raised, which is independent in its nature,

strictly judicial and one of great consequence, it would be considered on appeal. Engle v. Miller, 303, Ky. 731, 199 S.W. (2d) 123. While we cannot consider the merits of this case on appeal we can determine whether or not the ordinance proposing annexation was duly passed, as well as the constitutionality of KRS 81.190."

JUDGMENT OF THE COURT

The Court therefore orders and adjudges as follows:

(1) That the plaintiff's complain. and protest against annexation be, and the same is hereby dismissed and judgment awarded the Defendant;

(2) That the annexation by the City of Erlanger of the territory described in the complaint and in ordinance #1026 of the City of Erlanger is hereby approved and shall be final; said property to be annexed is described as follows:

Beginning at a point in the center of Stevenson Road in the present corporation line of the City of Erlanger as established by Ordinance 787, adopted November 4, 1952, and running thence:

1. N. 48° 30′ E. and along the present corporation line (also the dividing line between Gripshover and Prewitt), a distance of 1118 ft. more or less, to a point; thence,

2. S. 41° 30′ E. and along Prewitt's northeasterly boundary, a distance of 996.14 ft. to a point in the center line of Turkey Foot Road; thence,

3. S. 41° 30′ E. a distance of 352.33 ft., to a point, said point being located 250 ft. southeast of the center line of Turkey Foot Road as measured at right angles thereto; thence,

4. S. 3° 42′ W. parallel to and 250 ft. distant from Turkey Foot Road, a distance of 599.55 ft., to a point; thence,

5. S. 13° 20′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 347.59 ft. to a point; thence,

6. S. 5° 20′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 801.62 ft., to a point; thence,

7. S. 20° 25′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 875.63 ft. to a point; thence,

8. S. 39° 49′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 623.42 ft., to a point; thence,

9. S. 44° 51′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 262.87 ft. to a point; thence,

10. S. 20° 41′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 332.22 ft. to a point; thence,

11. S. 63° 26′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 437.38 ft., to a point; thence,

12. N. 79° 54′ W. continuing parallel to and 250 ft. distant from Turkey Foot Road, a distance of 192.42 ft., to a point; thence,

13. N. 41° 30′ W., a distance of 402.48 ft. to a point in the center line of Turkey Foot Road; thence,

14. S. 78° 30′ W., leaving Turkey Foot Road and up to the center line of Bullock Pen Creek, a distance of 750 ft., more or less, to a point in the dividing line between David Ringo and George Kees; thence,

15. N. 26° 00′ W. and along the dividing line between David Ringo, George Kees and Robert Sellers, a distance of 1900 ft. more or less, to a point in the southeasterly line of George McHugh; thence,

16. N. 60° 00′ E. and along the dividing line between George McHugh and David Ringo, a distance of 780 ft. more or less to a point in the southwesterly line of James Mullins; thence,

17. N. 55° 00′ W. and along the dividing line between James Mullins and George McHugh a distance of 991 ft. more or less to a point in the southeasterly line of the old Wilkins tract; thence,

18. N. 48 ° 30′ E. and along the dividing line between James Mullins and The Wilkins tract a distance of 1320 ft. more or less to a point in the present corporation line of the City of Erlanger as established by Ordinance 787 adopted November 4, 1952; thence,

19. S. 40° 25′ E. and continuing along the present corporation line of the City of Erlanger a distance of 474 ft. to a point; thence,

20. N. 48° 30′ E. and continuing along the present corporation line of the City of Erlanger a distance of 920 ft. more or less to the place of beginning.

(3) That the cost of this action shall be assessed against the Plaintiffs.

/s/ RODNEY G. BRYSON
Judge, Kenton Circuit Court

APPENDIX B

COURT OF APPEALS OF KENTUCKY

ROBERT J. JOBE, ET AL.,
Appellants,

vs.

CITY OF ERLANGER,
Appellee.

Appeal From Kenton Circuit Court
Common Law and Equity Division
Honorable Rodney G. Bryson, Judge

OPINION OF THE COURT BY COMMISSIONER CULLEN
(Rendered May 8, 1964.)

AFFIRMING

The appellants are resident freeholders in an area of some 350 acres proposed to be annexed by the City of Erlanger, a third-class city. They have undertaken to appeal from a judgment of the circuit court, in a remonstrance suit, upholding the annexation.

The statute governing annexation by third-class cities, KRS 81.190 (4), provides that there shall be no appeal from the judgment of the circuit court in a remonstrance suit. There is a similar denial of an appeal in the statute relating to annexation by fifth-class cities, KRS 81.230 (3), but an appeal is permitted by the statutes applicable to cities of the first, second, fourth and sixth classes.

The appellants maintain that the statutory denial of an appeal in third-class city cases is unconstitutional as discriminatory, special legislation. A similar contention was made, and rejected, in Yount v. City of Frankfort, Ky., 255 S.W. 2d 632, wherein the court cited Lenox Land Co. v. City of Oakdale, 137 Ky. 484, 125 S.W. 1089, as authority for the proposition that the legislature constitutionally may provide different methods of annexation for different classes of cities.

We believe the holding in the Frankfort case is sound. Under Section 156 of the Kentucky Constitution cities may be divided into classes for the purposes of *organization and government*. Acts relating to organization and government of cities may distinguish between cities according to class without violating constitutional prohibitions against special legislation. Mannini v. McFarland, 294 Ky. 837, 172 S.W. 2d 631. Annexation is a matter of organization and government of cities. Lenox Land Co. vs. City of Oakdale, 137 Ky. 484, 125 S.W. 1089.

The appellants argue that even if they have no statutory right of appeal they nevertheless are entitled to an appellate review of the constitutional question of whether the annexation constitutes a taking of property without due process of law and without compensation. See Chesapeake & Ohio Railway Company v. Murphy, 314 Ky. 309, 234 S.W. 2d 969. The appellants say that the annexed area includes two farm tracts, one of 60 acres and the other of 40 acres, and a two-acre orchard tract, none of which is adaptable for municipal uses. The appellants contend that the taking of these tracts is unconstitutional under the ruling in Chesapeake & Ohio Railway Company v. City of Silver Grove, Ky., 249 S.W. 2d 520.

It is doubtful whether these appellants are entitled to raise the constitutional question, because they do not own

any of the three tracts claimed to be incapable of municipal use. However, the claim of unconstitutionality cannot in any event be sustained, because the evidence does not show that the three tracts are incapable of or inadaptable for municipal uses or purposes, within the meaning of the Silver Grove case, but only that the tracts are not presently being devoted to urban use.

We have accepted the appeal only for the purpose of passing on the constitutional questions raised. The question of whether the city adequately sustained its burden of proof is not reviewable.

The judgment is affirmed.

Judge Montgomery dissenting.

APPENDIX C

COURT OF APPEALS OF KENTUCKY

ROBERT J. JOBE, ET AL.,
Appellants,

vs.

CITY OF ERLANGER,
Appellee.

Appeal From Kenton Circuit Court
Common Law and Equity Division
Honorable Rodney G. Bryson, Judge

DISSENTING OPINION BY JUDGE MONTGOMERY

(Rendered May 8, 1964.)

The majority opinion rejects the argument of unconstitutionality on authority of Yount v. City of Frankfort, Ky., 255 S.W. 2d 632. In that case the statute authorizing a third-class city to annex certain territory was held not to violate the due process clause of the Federal Constitution.

This is no answer to my objection that the statutory denial of an appeal in third-class city annexation cases is a denial of the equal protection of the law to appellants in violation of the equal protection clause of the Federal Constitution. The concept of equal protection of the laws stems from the American ideal of fairness. Equal protection to all is the basic principle on which rests justice under the law. The clause in the Federal Constitution forbidding the states to deny equal protection of the laws guarantees the treatment alike in the same place and under like circumstances and conditions of all persons subjected to state

legislation. The Fourteenth Amendment of the United States Constitution expressly forbids a state to deny any person within its jurisdiction equal protection of the laws. It is a guaranty that all persons subjected to state legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities imposed. 16A C.J.S., Constitutional Law, Section 502, pages 296 and 297.

As is pointed out in the majority opinion, KRS 81.190 (4) expressly provides that there shall be no appeal from the judgment of the circuit court in annexation proceedings involving third-class cities. It is further pointed out that there is a similar denial of an appeal in the statute relating to annexation by fifth-class cities. Appeals are permitted in similar cases involving cities of the other four classes.

There is no valid basis for saying that appeals shall be permitted in second and fourth-class city annexation cases and that an appeal shall be denied in a third-class city. Cities are classified on the sole basis of population. Kentucky Constitution, Section 156. Express provision therein is made for the change of classification of a city as its population may increase or decrease. Such differences in population cannot be made the basis for denying the freeholders of territory contiguous to a city the right to appeal in an annexation proceeding. There is no reasonable relationship between population and appeals. There is no difference in circumstance or condition between freeholders of territory contiguous to second, third, and fourth-class cities, except the difference in population of the respective cities. It is possible that the population may be the same or substantially so in cities of different classes.

The inevitable conclusion is that the statute which denies an appeal in this case is a denial of the equal protection of the law under the Federal Constitution.

Accordingly, I respectfully dissent.

APPENDIX D

In the

COURT OF APPEALS OF KENTUCKY

No. V-66-62

ROBERT J. JOBE and WILLIAM B. FARNEY,
Appellants,

vs.

CITY OF ERLANGER,
Appellee.

BRIEF FOR APPELLANTS

STATEMENT OF FACTS

This is an Appeal from a decision of the Kenton Circuit Court upholding and approving the annexation by the City of Erlanger, Kentucky, a municipal corporation of the third class, of an area lying to the southeast of the present city limits. A proposed annexation was undertaken by the city in May, 1959 and within the time prescribed by statute, Appellants filed a suit in remonstrance against said proposed annexation. By stipulation, counsel for respective parties agreed that the ordinance proposing annexation was legally and properly enacted; that 75% or more of the freeholders of the area proposed to be annexed were opposed to said annexation; and that the

issues to be determined were the constitutionality of the statute under which annexation was undertaken; to-wit, Kentucky Revised Statute 81.190; and whether defeat of annexation would materially retard the prosperity of the City of Erlanger and would further materially retard the prosperity of the owners and inhabitants of the proposed area.

Pursuant to the terms of the annexation statutes, more than 75% of the freeholders having objected to annexation, the city bore the burden of proof relative to all questions of fact and initiated the testimony. At the conclusion of the city's evidence, Appellants moved for a Directed Verdict, declaring the annexation to be null and void and of no force and effect, which motion was overruled and at the conclusion of all the evidence by all parties hereto, the matter was taken under submission by the Court and after submission of briefs by respective counsel and on March 29, 1962, Hon. Rodney G. Bryson, Judge, Kenton Circuit Court, Common Law & Equity Division, entered judgment approving annexation and dismissing Appellants' Complaint.

ARGUMENT

A. The statute under which the City of Erlanger proceeded to annex the invloved area is unconstitutional.

As will be seen from the record of these proceedings, Appellants raised a constitutional objection to annexation, pursuant to KRS 81.190(4), to-wit:

"There shall be no appeal from the judgment."

It is contended by Appellee that the Kentucky Court of Appeals has previously ruled on the constitutionality of said statute, most recently in the case of: *Yount* v. *City of Frankfort,* 255 SW(2d) 632.

As seen from that and earlier cases, our Court of Appeals, it is true, has consistently ruled that denial of the right of appeal, of itself, does not render a statute unconstitutional. This fact, Appellants concede; however, this is not the basis for the objection.

This statute (KRS 81.190) is unconstitutional, since it denies the right of appeal, whereas annexation statutes affecting other classes of cities do not deny the right of appeal and therefore, such differentiation and classification is discriminatory, special legislation, and thus, unconstitutional.

City of Louisville v. *Klusmeyer,* 324 SW(2d) 831 (1959):

> "The question often arises, as it does here, whether legislation made applicable to only one class of city and not to the others comes within the bar of local or special laws defined by Sec. 59 (Kentucky Constitution).
>
> "The term 'local act' means, at least in part, a law confined to territorial limits other than that of the whole state or a law applicable to some political subdivisions and not to others. The term 'special law' is legislation which arbitrarily or beyond reasonable justification discriminates against some person or objects and favors others. King v. Commonwealth, 194 Ky. 143, 238 SW 373, 22 ALR 535. Both are prohibited not only by Sec. 59 of our Constitution but by the guarantees of equal protection of the Fourteenth Amendment of the Federal Constitution and Sec. 3 of the Kentucky Constitution. Markendorf v. Friedman, 280 Ky. 484, 133 SW(2d) 516, 127 ALR 416, 309 U.S. 627, 60 S. Ct. 610, 84 L. Ed. 987."

It is seen that the right of appeal, in annexation matters, has the following unreasonable, illogical and discriminatory pattern:

a). First Class Cities – Right of Appeal.
b). Second Class Cities – Right of Appeal.
c). Third Class Cities – *Appeal denied.*
d). Fourth Class Cities – Right of Appeal.
e). Fifth Class Cities – *Appeal Denied.*
f). Sixth Class Cities – Right of Appeal.

Appellants urge it is no answer to the question to say, as was said in *Yount* v. *City of Frankfort* (*supra*), that the constitutionality of said statute has been upheld so often that it cannot any longer by seriously challenged.

First of all, unconstitutionality on the basis of Secs. 59 and 3 of the Kentucky Constitution and of the Fourteenth Amendment of the Federal Constitution, were not, it appears, raised on this particular issue, in the cited case and in earlier cases, but only the fact of denial of appeal, of and in itself.

Secondly, KRS 81-190 is unconstitutional for the reasons stated, whether or not these issues have been raised previously or not. No one could logically say that there is any reasonable basis existing for legislatively treating third and fifth class cities different not only from cities superior in size and importance and also different from cities inferior to it.

Nor do Appellants consider it any answer to the constitutional objection to state that nonetheless the Court of Appeals is, in fact, in this instance, hearing the Appeal, for this was done not only in *Yount* v. *City of Frankfort* (*supra*) but also in *Engle* v. *Miller*, 303 Ky. 731, 199 SW (2d) 123; in which cases, the Court of Appeals declined to review the questions of fact, on the basis of the statutory

denial of the right of appeal. It is denial of the right of appeal as to the questions of fact which is denied to some classes of cities and granted to others, which is the discriminatory character of this unconstitutional statute.

B. Annexation of the area herein involved is unconstitutional as amounting to a taking of private property without due process of law as prohibited by the Federal Constitution and also by Secs. 13 and 2 of the Constitution of Kentucky.

C & O Ry. Co. v. *City of Silver Grove,* 249 SW(2d) 520:

> "A statute providing for incorporation of cities does not authorize incorporation into a city of property incapable of any municipal use."

Stephens v. *Felton,* 99 Ky. 395, 35 SW 1116:

> "It would have been impracticable and oppressive to incorporate the proposed town, since a very large part of it was used for farming purposes."

Albershart v. *Donaldson,* 149 Ky. 510, 149 SW 875.

> "The boundary should not be established so as to embrace within it land which may not be urban property in any sense of the word."

Russell v. *Ironton-Russel Bridge Co.,* 249 Ky. 307, 60 SW(2d) 628:

> "Property may not be included within the corporate limits of a city if it is not adapted and can never be utilized for some municipal purpose."

The proposed area, consisting of approximately 350 acres, contains a 60 acre tract owned by James E. Mullins, which is devoted exclusively to the raising of hogs and other livestock.

There is a 40 acre tract owned by Alfred Hesselman, which the testimony shows, is used for agricultural purposes and the raising of livestock.

There is a vacant lot of approximately one and one-half acres, made up entirely of fruit trees. The same can be said, in general, of the 59 acre tract owned by David Ringo.

C. The judgment sustaining annexation is based on Findings of Fact, which are contrary to the evidence.

(1). The Court found that the area proposed to be annexed is the only remaining territory subject to potential development; that the area to the north of the city was not adaptable to annexation.

To the contrary, the evidence is as follows:

Transcript of Evidence (Page 13)

> "Q. I will ask you (Mr. Viox, City Engineer) whether, in your opinion, the area I have indicated, that being the area from the Boone County line running this way, would be available to the City of Erlanger for proposed annexation?
> A. Yes, it is available to the city."

Transcript of Evidence (page 64)

> "Q. You have approximately 260 to 270 residential lots in the present area of Erlanger not yet developed?
> A. (Clyde Rouse, City Coordinator) I think that is a fair estimate."

(2). The Court found that most of the utilities and improvements available in the area proposed to be annexed, were the direct result of the efforts of the Appellee; that the sanitary sewer line which crosses this area, is the result of the contract entered into between the City of Erlanger and the Sanitation District; that the expenses in-

curred in the construction of this line were borne in part by the residents of the City of Erlanger.

The testimony in this case, particularly that furnished by the city's witnesses is directly opposite to each and everyone of such alleged findings of fact. In addition, are we to presume that the city has expended funds illegally outside their corporate boundaries; and that the city has presumed to make agreements for an area outside its city limits?

(3). The Court found that the Stephenson Road water main is the result of negotiations between the city and the Kenton County Water Commission and the construction of the main along Turkeyfoot Road was favorably influenced by these negotiations.

Again, the testimony in this case is directly opposite to each and everyone of such alleged findings of fact. Neither the city nor the Kenton County Water Commission would have legal authority to make any agreement as was inferred in this "Finding of Fact," with respect to any area not then a part of the city.

(4). The Court finds that the county or city zoning to be enjoyed by the inhabitants of this territory, will be the direct result of the present zoning regulations of the city to which this territory is contiguous.

Counsel for Appellants is at a loss even to understand the meaning of this statement, much less to consider how this can have any bearing on the decision, one way or the other.

(5). The Court finds that the City of Erlanger is a prosperous and progressive third class municipality.

Appellants urge there is little evidence to support this statement, particularly when we consider that the present residents of this city, are to the present day, paying a double sanitation bill, in order to retire a defaulted bond issue existing since the early 1930s.

On the other hand, this unsupported statement if taken as true, rather militates against the proposition that failure to annex will materially retard the prosperity of the city.

D. Appellee bears the burden of proof and has not gone forward with sufficient evidence to sustain the findings herein.

As stipulated by counsel for respective parties, more than 75% of the freeholders in the area proposed to be annexed, object to said annexation. Pursuant therefore to KRS 81.110 and 81.190, the city bears the burden of proving:

a). That failure to annex will materially retard the prosperity of the city.

b). That failure to annex will materially retard the prosperity of the owners and inhabitants of the area sought to be annexed.

Relative to the city's prosperity, counsel for Appellants has searched the record of this case in an effort to locate some testimony relative to this point, to no avail.

Yes, there is testimony to the effect that the city has only about 270 more houses to build. Does this, standing alone, give any indication of retarded prosperity? Does the city rather mean to imply that its only real interest in annexation is to increase its tax duplicate? In truth, when all is said and done, this is the one and only reason that any city ever has undertaken, or will in the future, undertake annexation.

If increased tax revenue is sufficient reason, by itself, to sustain a finding that the city's prosperity will be "materially retarded" by defeat of annexation, the statutes further require, where more than 75% of the freeholders have protested, that the city must further bear the burden of proving that defeat of annexation will likewise materially

retard the prosperity of the owners and inhabitants of the area sought to be annexed.

Such a proposition is ridiculous and tantamount to stating that if the inhabitants will only let the City of Erlanger go ahead, why, the city is going to make each of them, individually, a lot richer.

But then, what does the city propose to "give" to these residents?

1). Water lines — These the residents already have available.
2). Sanitary lines — These the residents already have available.
3). Police Protection — This is already made available by the Kenton County Police, which has more men, more vehicles, more equipment.
4). Fire Protection — This is already available to the residents through the Southern Hills Voluntary Fire Department, to whom the area has been assigned by the State Actuarial Bureau.
5). Electricity — This the residents already have.
6). Roads — These are now provided by the State and County and properly maintained.

Relative to the lengthy discussion about fire protection, it is seen that upon completion of the new fire house being built by Southern Hills Fire Department, it will be closer to the proposed area than either the present Erlanger fire house or the one now under construction on Commonwealth Avenue. As a result of the new fire house and its proximity, the Appellants will acquire Seventh Class fire insurance.

On the other hand, the distance from the present Erlanger fire house or the one under construction on Commonwealth Avenue, would place these same residents in

a Ninth or Tenth class insurance rate, or so the testimony of the witnesses would indicate.

In any event, annexation has absolutely nothing to do with fire rates; rather, distance from the fire house, quantity and quality of equipment, and accessability of water mains are determinative.

While there was testimony to the effect that the city *might* even build a third fire house, or that the idea had been *considered* or even *proposed,* though no plans or specifications have been considered, Appellants urge that the city fell far short of proving that it ever intends to follow through with such plans. In any event, such extraordinary efforts on the part of a city of 7,000 people, considered together with the anticipated costs of its new city building, the operation of two other fire departments, its defaulted and antiquated bond issue, its history of periodically and repeatedly raising taxes, its creation of a $7200.00 job for a City Coordinator, absent statutory authority, and other matters, lead Appellants readily to their firm conviction that annexation of their homes can hardly be expected to result in an increment to their personal financial prosperity.

In any event, it cannot be said, in view of opposition by more than 75% of the freeholders of the area proposed to be annexed, that the City of Erlanger has sustained the burden of proving that defeat of annexation will materially retard the prosperity of the owners and inhabitants of the area to be annexed.

While the legislature has seen fit to require more than a majority of residents to defeat annexation, requiring instead, 75% thereof, it seems clear that the legislative intent, at least in general, is to the effect that annexation shall be defeated in the face of such numerical superiority, unless the factors mentioned above have been conclusively shown to amount to a virtual end or ruination of the City of

Erlanger unless annexation is approved. The record of this case presents no such case; it presents merely an opportunity for the city to increase its tax revenue, without any showing of corresponding benefit to the proposed residents.

As stated in the case of *City of Cold Spring* v. *John Laycock,* 312 SW(2d) 882:

> "While taxation as such is not a ground for denying annexation, it may be considered as one of the burdens for which the property owner would receive no adequate return."

It seems self-evident that that rule of law should be applied with even special emphasis, when such taxation evidently will be accompanied by no end of assessments, particularly assessments for facilities which are now available and accessible to the residents to be installed as each sees fit, at his own time and leisure.

While the annexing authorities would have us believe that they will save all mankind from themselves by providing for its every need, there will always exist individuals like James C. Beers, who testified in this matter, who chose cistern water over city water, his own state approved septic tank to city sewers, bottle gas to city gas, rural living to urban existence. And while the writer, himself, has chosen to the contrary in every respect and is himself a resident of the City of Erlanger, I am not convinced that the Court of Appeals will enforce such regulations on unwilling victims, absent a clear and preponderent showing of need and desirability. As is made clear in our every day living, it would be an unfortunate occurrence if everyone returned to the farm; on the other hand, we have seen clear examples, and will in the future see even more startling examples of the mistake of converting all of our land to housing development and all of our residents to city dwellers. It is a strange law, indeed, which uncon-

trollably would uproot the resident who has abandoned the city for his own good reasons, and thrust him immediately back into the same situation which he has made every effort to escape. As a result of these and similar efforts on the part of over-ambitious cities in Kenton County it has now become virtually impossible to remain in an unincorporated area and the writer is at a loss to discern any good reason why such stringent measures should be permitted to prevail.

The matter of annexation has been described in previous decisions to be a matter not so much of a legal question, but of a political question. As such, this "political" question, as all political questions, should be decided in large measure by a vote of the people. The involved residents have, in this instance, voted overwhelmingly to be relieved of the clutches of the City of Erlanger. This choice, under the facts of this case, should prevail.

CONCLUSION

The statute under which annexation is hereunder proposed, KRS 81.190, is unconstitutional as an act of only local and special application and as such, discriminatory, void and unconstitutional.

Furthermore, the City of Erlanger, having the burden of proving that defeat of annexation would not only materially retard its own prosperity, but that of the owners and inhabitants of the proposed area, as well, has failed in every respect to sustain the burden of proof.

Respectfully submitted,

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